

<p style="text-align: center;">CHAPTER II FREE APPROPRIATE PUBLIC EDUCATION 707 KAR 1:290</p>
--

TABLE OF CONTENTS

SECTION 1. FREE APPROPRIATE PUBLIC EDUCATION.	1
No Cost to Parents	1
Private Insurance.....	2
Medicaid	2
Standards Determining FAPE.....	3
ARC Placement of the Child in Private Schools or Facilities	3
Placement by the ARC in a Private School in Kentucky.....	5
Placement at KSB or KSD.....	5
Placement in Another Public School in Kentucky.....	6
Placement in Out-of-State Private Schools.....	6
Other State Agencies Responsible for Education	6
Payment for Services	6
Contract Provisions.....	7
SECTION 2. RESIDENTIAL	8
SECTION 3. PROPER FUNCTIONING OF HEARING AIDS.....	8
SECTION 4. PROGRAM OPTIONS	8
SECTION 5. NONACADEMIC SERVICES.....	9
SECTION 6. PHYSICAL EDUCATION	9
SECTION 7. ASSISTIVE TECHNOLOGY	10
SECTION 8. EXTENDED SCHOOL YEAR SERVICES.....	10
Extended School Year Criteria	11
Verification of Regression and Excessive Recoupment Time.....	11
ARC Analysis of Criteria.....	12
Consideration of ESY Services for 3 -year-olds in Transition	12
FAPE RESOURCES.....	14
OSEP and IDEA Partnership Approved Materials:	14
Relevant KY Statutes and Regulations:	14
Materials Developed by KDE:.....	14
Pertinent Case Law (in order by date of decision):.....	14

SECTION 1. FREE APPROPRIATE PUBLIC EDUCATION

A LEA shall make a free appropriate public education (FAPE) available to all children with disabilities aged three (3) to twenty-one (21) residing within its district's boundaries, including children with disabilities who have been suspended or expelled for more than ten (10) school days in a school year.

The KLEA makes a free appropriate public education available to each child with a disability:

- a. whose age is three (3) to twenty-one (21) years;
- b. who resides in a home, facility, residence, or any type of shelter within the KLEA's geographical boundaries; (see "Other State Agencies Responsible" in this Section)
- c. who has a disability, regardless of the severity;
- d. who needs specially designed instruction and related services;
- e. who has been suspended or expelled for more than ten days in a school year, and
- f. who has not graduated with a general education diploma.

The KLEA makes a free appropriate public education (FAPE) available to children with disabilities as specified and provides the child and parents all of the rights under Part B of IDEA, and Kentucky laws and administrative regulations.

No Cost to Parents

"Free appropriate public education (FAPE)" means special education and related services that:

- (a) are provided at public expense, under public supervision and direction, and without charge;
- (b) meet the standards of the Kentucky Department of Education included in 707 KAR Chapter 1 and the Program of Studies, 704 KAR 3:303, as appropriate;
- (c) include preschool, elementary school, or secondary school education in the state; and
- (d) are provided in conformity with an individual education program (IEP) that meets the requirements of 707 KAR 1:320. (Chapter I, Definitions)

"Public expense" means that the LEA either pays for the full cost of the services to meet the requirements of 707 KAR Chapter 1 (special education regulations) or ensures that the services are otherwise provided at no cost to the parent. Nothing in these regulations shall relieve an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a child with a disability.
(Chapter I, Definitions)

The KLEA makes sure that any expenses for the identification, evaluation, and educational placement of a child with disabilities, or the provision of specially designed instruction and related services for a child with disabilities are at no cost to parents.

At no cost to parents also includes at no cost to the child if emancipated (age eighteen or married). This requirement does not preclude charging incidental fees which are normally charged to children without disabilities or their parents as part of the regular education program (e.g., activity fees, field trips, etc.).

Private Insurance

The KLEA provides and uses local, state, federal, and other fiscal resources as needed to provide the specially designed instruction and related services needed by children with disabilities. The KLEA ensures services are at no cost to parents through:

- a. interagency agreement; state, local or federal funds; or insurance reimbursement arrangements; or
- b. the use of third party payments, private or public, which support the education or non-education costs of providing a child with a disability a free appropriate public education. The KLEA may use third party payments when:
 1. the parents agree to the use; and
 2. there are no "out-of-pocket" costs for the parent such as a deductible amount incurred in filing a claim; and
 3. there is no increase in the costs to the parents; and
 4. there is no decrease in benefits to the parents; orwhen:
 1. the parents agree to the use; and
 2. the district pays any out-of-pocket or increased costs; and
 3. there is no decrease in benefits to the parents.

(g) Use of Part B funds.

- (1) If a public agency is unable to obtain parental consent to use the parent's private insurance, or public insurance when the parent would incur a cost for a specified service required under this part, to ensure FAPE the public agency may use its Part B funds to pay for the service.**
- (2) To avoid financial cost to parents who otherwise would consent to use private insurance, or public insurance if the parent would incur a cost, the public agency may use its Part B funds to pay the cost the parents otherwise would have to pay to use the parent's insurance (e.g., the deductible or co-pay amounts). (§300.142 Methods of ensuring services.)**

Based on a cost effectiveness analysis, the DoSE, in consultation with the Superintendent and the KLEA Representative, may determine on a case-by-case basis that expenditure of IDEA funds to cover any costs to parents for the use of private or public insurance is warranted.

Medicaid

The KLEA is an authorized school-based health services provider. When a child with a medical card receives a billable service (speech, OT, PT, evaluations, etc.) through the IEP, the parent will be asked, by the assigned case manager, to give written authorization for the KLEA to bill these services directly to the child's medical card. The parent may chose to deny access to this Medicaid billing at any time. It is important that the parent understand that the child's benefits under the Medicaid program are not reduced because the KLEA bills for appropriate services. Parent and child rights, and the services provided through an IEP are not affected in any way by the KLEA's participation in the Medicaid program. In the event a child has a medical card and also has private health

Chapter II

Free Appropriate Public Education

insurance, the case manager will inform the KLEA Representative, who will contact the DoSE prior to making any decision to bill Medicaid for services.

Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or pay for services, including transition services, provided to a child with a disability. This includes the Department of Vocational Rehabilitation or any other participating agency for which a child with disabilities meets eligibility criteria of that agency.

The KLEA administers and uses all fiscal resources available for the education of children with disabilities according to all applicable state and federal laws and regulations.

Standards Determining FAPE

The KLEA and its schools provide services for children and youth with disabilities of school attendance age, three to twenty-one years, consistent with the KY Program of Studies, 707 KAR Chapter 1 (special education regulations), and KLEA procedures. (See Section 4.)

Services for children and youth with disabilities include:

- a. individualized instruction to meet the unique needs of a child with disabilities; and
- b. the variety of programs, services, and activities provided for children without disabilities.

FAPE is provided through an IEP that serves as a plan of appropriate education reasonably designed to meet the individual needs of a child with a disability.

FAPE shall be provided to each child with a disability based on the child's unique needs and not on the child's disability.

All decisions of the ARC must relate to the specific child, and not the commonly anticipated needs of most children who have the same disability or categorical label.

ARC Placement of the Child in Private Schools or Facilities

A LEA shall be responsible for ensuring the rights and protections under 707 KAR Chapter 1 (special education regulations) are given to children with disabilities referred to or placed in private schools and facilities by that LEA.

"When an LEA is responsible for the education of a child with a disability, the LEA remains responsible for developing the child's IEP, regardless of the public or private school setting into which it places the child." (Federal Appendix A, Q & A #15)

When the child is placed in another program, the DoSE:

- a. makes sure the ARC membership includes a representative of the other agency;

Chapter II

Free Appropriate Public Education

- b. convenes the ARC meetings requested by the other program regarding review and revision of the IEP;
- c. arranges participation by the other program, including individual or conference, telephone calls, if the representatives cannot attend;
- d. conducts meetings for reviewing and revising the IEP according to procedures at least on an annual basis or when requested by the parent or any other ARC member;
- e. makes sure reevaluation procedures are followed at least every three years or as requested by the parent or the other agency according to policies and procedures in Chapter 3, Child Find and Evaluation;
- f. makes sure the ARC determines placement on an annual basis;
- g. makes sure that the child and parent are afforded all rights and protections afforded under 707 KAR Chapter 1 (special education regulations); and
- h. monitors implementation of the terms specified in the contract or agreement.

If an ARC determines that appropriate specially designed instruction and related services cannot be provided through existing programs in the KLEA, then the KLEA Representative contacts the DoSE and requests that the DoSE attend an ARC meeting for the consideration of placement alternatives. The recorder documents the ARC's decisions and timelines in the meeting summary.

The DoSE makes sure the receiving program is operated by an agency or organization that has indicated a willingness to provide the services specified by the ARC.

The DoSE contacts the program which provides the type of services specified on the IEP regarding the possible referral of the child to the program and makes arrangements for the representative of the program to participate in the ARC meeting. Participation by the representative of the other program is provided through attendance at meetings, written communication, or individual or conference calls.

In accordance with written notification of meeting, the ARC, including a representative of the other program, meets to address the referral of the child to the private program.

The ARC reviews the IEP of the child in collaboration with the representative of the program to determine if the program is able to provide the specified services.

If a representative from the other program attends the ARC meeting and agrees with the ARC decision that the program is acceptable, then the program assumes responsibility for providing the specially designed instruction and related services on the IEP. If the program is acceptable, and a representative from the other program cannot attend the ARC meeting but agrees with the ARC decision through written communication or conference call, the other program assumes responsibility for providing the specially designed instruction and related services on the IEP.

The DoSE informs the other program of the ARC's decision regarding placement by letter including a copy of the IEP according to the timelines as specified on the IEP and the

Chapter II

Free Appropriate Public Education

meeting summary. The DoSE completes a contract with the other program, and arranges for transportation for the child consistent with beginning dates in the IEP.

If the program is not appropriate, then the ARC members explore options for other alternative placements. The ARC schedules another ARC meeting. The summary recorder documents the ARC's decisions and timelines in the meeting summary.

During the time that the placement in another program is being developed, the KLEA remains responsible for the provision of FAPE to the child.

If the receiving program fails to provide the specially designed instruction and related services specified in the IEP, then the DoSE initiates an ARC meeting.

The KLEA is responsible for ensuring that the child has all of the rights of a child with a disability who is directly served by the KLEA. Any mediation, complaint, or due process hearing is filed with regard to the KLEA, not the private school or other facility.

Placement by the ARC in a Private School in Kentucky

If the child with a disability is placed in a private education program, the KLEA ensures that the special education and related services are:

- a. in conformance with the IEP;
- b. at no cost to the parents; and
- c. meet the standards that apply to education provided by state and local education agencies.

KLEA personnel make sure that all appropriate procedures are followed prior to placing the child with disabilities in a private program.

Placement at KSB or KSD

If the child of school age is placed for resident instruction at the Kentucky School for the Deaf (KSD) or the Kentucky School for the Blind (KSB), the KLEA provides transportation to and from the school on a regularly scheduled basis, at weekly intervals while the child is enrolled, either individually or in cooperation with other districts on a regional basis. Students who live more than two hundred (200) miles from either school are not required to go home more than twice each month. (KRS 157.280) Students follow the transportation schedule and participate in the weekend activities for students who remain at school according to policies established by KSD or KSB and approved by the State Board of Education. (see Chapter V, IEP, Section 1)

If the child of school age is placed as a day school pupil for instruction at KSB or KSD, KLEA provides transportation to and from the school on a daily basis, or in accordance with the IEP, either individually or in cooperation with other school districts on a regional basis.

Chapter II

Free Appropriate Public Education

The DoSE, in consultation with the Director of Transportation, makes arrangements for regional transportation planning when feasible and obtains approval from the State Board of Education according to procedures provided by the Kentucky Department of Education (KDE). The KLEA is reimbursed from the state transportation fund according to calculations and procedures provided by the KDE. (KRS 157.280)

Placement in Another Public School in Kentucky

The KLEA may enter into cooperative agreements for the provision of services to children with disabilities. In the event the ARC considers placement of the child in another school district, the DoSE shall be invited to the meeting.

Placement in Out-of-State Private Schools

"Regardless of the reason for the out-of-state placement, the "placing" State is responsible for ensuring that the child's IEP is developed and that it is implemented. The determination of the specific agency in the placing State that is responsible for the child's IEP would be based on State law, policy, or practice. However, the SEA in the placing State is ultimately responsible for ensuring that the child has FAPE available." (Federal Appendix A, Q & A #16)

If the ARC exhausts approved placement alternatives located within the Commonwealth of Kentucky, then the ARC explores placement alternatives in other states. The KLEA Representative contacts the DoSE and requests that the DoSE attend an ARC meeting for the consideration of placement alternatives. The recorder documents the ARC's decisions and timelines in the meeting summary.

Other State Agencies Responsible for Education

State agencies charged with the responsibility of providing educational services to children with disabilities within their care shall provide those services in accordance with 707 KAR Chapter 1 (special education regulations).

State agencies that are responsible for providing educational services to children with disabilities are the Cabinet For Families and Children and the Department of Juvenile Justice. These agencies may contract with local school districts for the provision of educational services, or may hire staff to provide such services.

Payment for Services

If payment for services under 707 KAR Chapter 1 is to be provided by an agency other than the LEA, the LEA shall ensure the services are provided without delay even if there is a delay in the payment for those services.

If the ARC determines that the child requires placement in a special education program operated by another county or independent district, or a private school or facility, the

Chapter II

Free Appropriate Public Education

KLEA maintains responsibility for the payment of the costs incurred in educating the child.

If the KLEA provides a program by contract with another county or independent district, or private organization that maintains a special education program approved by the State Board of Education, the KLEA shares the total cost of the special education program in accordance with a contract agreement between the two (2) districts or KLEA and the private organization.

"The public agency must ensure that all services set forth in the child's IEP are provided consistent with the child's needs as identified in the IEP. The agency may provide each of those services directly, through its own staff resources; indirectly, by contracting with another public or private agency; or through other arrangements. In providing the services, the agency may use whatever State, local, Federal, and private sources of support are available for those purposes (see §300.301(a)); but the services must be at no cost to the parents, and the public agency remains responsible for ensuring that the IEP services are provided in a manner that appropriately meets the student's needs as specified in the IEP. The State Education Agency (SEA) and responsible public agency may not allow the failure of another agency to provide service(s) described in the child's IEP to deny or delay the provision of FAPE to the child." (Federal Appendix A, Q & A #31.)

Contract Provisions

If another program accepts the child from KLEA, the contract specifies that the receiving program will:

- a. provide specially designed instruction and related services as specified on the IEP;
- b. make sure that the child and parent are afforded all rights and protections according to special education regulations;
- c. notify the KLEA of the need to initiate and conduct ARC meetings;
- d. monitor and evaluate the IEP at intervals specified on the IEP;
- e. forward written results of monitoring and evaluation of the IEP to the parent and the KLEA;
- f. participate in ARC meetings convened by the KLEA; and
- g. make sure that specially designed instruction and related services are provided by qualified personnel.

Educational records of the children and youth provided services in other programs are maintained by the DoSE. Copies of contracts, agreements, and correspondence are maintained in the educational records of children and youth.

The KLEA pays for the transportation of the child to and from the program in the other school district or to the private organization. However, if the school board of the other district or the private organization providing the program also provides transportation, the

cost of transportation may be included in the total cost of the contract.

SECTION 2. RESIDENTIAL

If it is determined necessary by an ARC to place a child with a disability for educational purposes in a private residential educational program, the program, including non-medical care and room and board, shall be provided by the LEA that convened the ARC. A LEA may fulfill its responsibility under this section by providing the services directly or by contracting for those services.

If an ARC determines that appropriate specially designed instruction and related services cannot be provided through existing programs in the KLEA and that a private residential education program is required for FAPE, then the KLEA Representative contacts the DoSE and requests that the DoSE attend an ARC meeting for the consideration of placement alternatives. The recorder documents the ARC's decisions and timelines in the meeting summary.

The same procedures are followed in making this decision that are detailed in Section 1. The KLEA will in this circumstance pay for non-medical care, room and board. The cost of the program will also be paid by the KLEA, unless it is possible for the KLEA to provide some or all components of the program directly. Arrangements for costs will be determined by the DoSE, in consultation with the Superintendent and the KLEA Representative

SECTION 3. PROPER FUNCTIONING OF HEARING AIDS

A LEA shall ensure that a hearing aid worn in school by a child with a hearing impairment is functioning properly.

A designee of the KLEA is assigned to monitor the functioning of hearing aids twice monthly. If an aid is found to be not functioning properly, parents are notified.

SECTION 4. PROGRAM OPTIONS

A LEA shall ensure that all children with disabilities have available to them the variety of educational programs, services and curriculum as described in the Kentucky Program of Studies, 704 KAR 3:303, that is available to children without disabilities. These educational services may include art, music, industrial arts, consumer and family science education, and career and technical education.

No child with a disability shall be denied access to any program, service, or curriculum solely on the basis of his or her disability. The ARC shall consider if special education and related services and supplemental aids and services are needed to allow participation, and make such provision as necessary. (see Chapter V, IEP)

All children, including children with disabilities, must be otherwise eligible for participation and thus meet established criteria for the specific programs, service, and

curriculum, e.g. prerequisite academic requirements for specific classes.

SECTION 5. NONACADEMIC SERVICES

A LEA shall take steps to provide all children with disabilities the nonacademic and extracurricular services and activities which give children with disabilities an equal opportunity for participation in those services and activities. These services and activities may include:

- (1) counseling services;
- (2) athletics;
- (3) transportation;
- (4) health services;
- (5) recreational activities;
- (6) special interest groups or clubs sponsored by the LEA;
- (7) referrals to agencies that provide assistance to individuals with disabilities; and
- (8) employment of students, including both employment by the LEA and assistance in making outside employment available.

No child with a disability shall be denied access to any program, service, or curriculum solely on the basis of his or her disability. (See Chapter V, IEP)

All children, including children with disabilities, must be otherwise eligible for participation and thus meet established criteria for the specific programs, service, and curriculum, e.g. prerequisite academic requirements for specific classes.

SECTION 6. PHYSICAL EDUCATION

A LEA shall make available to every child with a disability:

- (1) physical education services, specially designed if necessary; or
- (2) the opportunity to participate in the regular physical education program available to children without disabilities unless:
 - (a) the child is enrolled full time in a separate facility in which case the agency responsible for the education of the child in that facility shall ensure the child receives appropriate physical education; or
 - (b) the child needs specially designed physical education as prescribed in the child's IEP.

The ARC members decide, based on data collected and the Present Levels of Educational Performance (PLEP) descriptions in the IEP, if the child is to receive regular physical education, with or without modifications and supplementary aids and services, or specially designed physical education.

If physical education is not an identified need related to the disability of the child, apply the same criteria for participation as stated in Section 4, Program Options.

If goals and objectives/benchmarks include P.E., then the ARC describes the specially designed instruction or adaptive P.E. within the IEP.

The Recorder documents the discussion and decisions on the Conference Summary.

SECTION 7. ASSISTIVE TECHNOLOGY

A LEA shall ensure that assistive technology devices or assistive technology services, or both, are made available to a child with a disability if required as part of the child's special education, related services, or supplemental aids and services.

On a case by case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the ARC determines that the child needs access to those devices in order to receive FAPE.

(See Chapter V, IEP, Section 5, "ARC Considerations in IEP Development")

"A public agency must permit a child to use school-purchased assistive technology devices at home or in other settings, if the IEP team determines that the child needs access to those devices in non-school settings in order to receive FAPE (to complete homework, for example)." (Federal Appendix 1, Q & A #36)

The ARC shall determine if the assistive technology device is required to enable the child:

- a. to make progress towards the measurable annual goals in the IEP,
- b. to be involved in and progress in the general curriculum, or
- c. to participate in extracurricular and other nonacademic activities, if required to support specially designed instruction.

"Any assistive technology devices that are necessary to ensure FAPE must be provided at no cost to the parents, and the parents cannot be charged for normal use, wear and tear. However, while ownership of the devices in these circumstances would remain with the public agency, State law, rather than Part B, generally would govern whether parents are liable for loss, theft, or damage due to negligence or misuse of publicly owned equipment used at home or in other settings in accordance with a child's IEP." (Federal Appendix A, Q & A #36.)

If the ARC determines the use of the device is required in non-school settings, this will be specified on the IEP.

The recorder will record the discussion and the decision on the Conference Summary.

SECTION 8. EXTENDED SCHOOL YEAR SERVICES.

"Extended school year services" means specially designed instruction and related services that are provided to a child with a disability beyond the normal school year in accordance with the child's IEP at no cost to the parents. (Chapter I, Definitions)

A LEA shall ensure that extended school year services are available to each child with a disability, as necessary, to provide FAPE. The determination of the need for extended year services shall be made on an individual basis. In making this determination, the LEA shall not:

- (1) limit the provision of extended year services to a particular category(s) of disability; or
- (2) unilaterally limit the type, amount, or duration of those services.

Extended School Year Criteria

The KLEA provides an extended school year (ESY) to a child with disabilities, regardless of the nature or severity of the disability, if the ARC determines the services are required in order for the child to receive a free appropriate public education. An extended school year program is provided when the recoupment time for a child with a disability exceeds that of similar age peers who are not disabled and who experience the same lapse in instruction. Research and case law has led to the determination that the average, and thus accepted and expected recoupment time for children without disabilities is within a range of six to eight weeks for a break in instruction of a comparable amount of time. (see Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1997))

An extended school year program extends beyond the regular school year for the purpose of maintaining the child's current skill level which, without continued instruction, would be lost or would require an inordinate time to regain those skills. ESY services are not designed to teach new skills, prevent normal amounts of regression, or allow the child to make additional progress, but simply to maintain the present level of educational performance and thus prevent excessive recoupment time. This excessive recoupment time would adversely impact the child's progress during the next school year, and must be avoided. Thus the child with a disability is able to make anticipated progress and receive FAPE during the normal school year.

Verification of Regression and Excessive Recoupment Time

In order to document evidence of regression/excessive recoupment, it is critical that reliable measures of student performance be available. The ARC makes its determination of the need for an extended school year, which is not based on any single criterion, by using the following:

- A. on-going progress data trends as developed by IEP implementers and based on progress monitoring data relative to all IEP goals which have been taught, in order to assess length of recoupment time, as follows:
 1. measurement at the end of instruction, e.g., prior to Christmas break;
 2. measurement at the beginning of instruction after a lapse of instructional time, e.g., return from Christmas break; and
 3. measurement at regular intervals until the performance level is equal to the performance when the lapse in instruction time began; **or**
- B. when there have been no breaks in instruction or there is uncertain data which can be analyzed to obtain valid assessment of recoupment,
 1. tests and observation data collected over a period of time; and

2. the opinion of professionals based on a professional individual assessment of student regression and recoupment skills.

ARC Analysis of Criteria

The ARC considers all progress data upon annual review of the IEP, and at any other time as requested by any member. Before making a decision on when extended school year services may be required, the ARC reviews the on-going progress data trends, tests, observation results and professional opinions as presented by the ARC members to make a determination regarding the possible requirement for provision of ESY services. If specific services have been provided during the interruption in the educational program, documentation must be considered that indicates regression and excessive recoupment time would have been a pattern for the student had no services been provided.

The services and the amount of time required for ESY may vary for each student as determined by the appropriate ARC. In addition, the type and amount of service is specific to the area(s) of service required to prevent excessive recoupment time, and not necessarily the full range or amount of service that was contained in the most recent IEP.

If the ARC determines the child does not require an extended school year, then the recorder documents the ARC's decision and rationale in the meeting summary, and sends Notice of Proposed/Refused Action in accordance with Chapter VII, Procedural Safeguards, Section 3,.

If the ARC determines the child requires an extended school year, then the recorder documents the services presently in the IEP that are to be provided in an extended school year program, the amount of time and location of the service(s) and the rationale for the decision in the meeting summary. A new IEP need not be written for ESY only. The ARC completes and sends the Notice of Proposed/Refused Action in accordance with Chapter VII, Procedural Safeguards, Section 3.

The KLEA representative, in consultation with the DoSE, makes arrangements for the child to receive extended school year services according to the specifications of the ARC decision.

Consideration of ESY Services for 3 -year-olds in Transition

An extended school year program extends beyond the regular school year for the purpose of maintaining the child's current skill level which, without continued instruction, would be lost or would require an inordinate time to regain those skills. ESY services are not designed to teach new skills, prevent normal amounts of regression, or allow the child to make additional progress, but simply to maintain the present level of educational performance and thus prevent excessive recoupment time. This basic philosophy is the same for the pre-school child.

"Children with disabilities who have their birthdays during the summer months are not

automatically entitled to receive special education and related services during the summer, and summer services must be provided only if the IEP Team (ARC) determines that the child needs ESY services during the summer in order to receive FAPE." (Federal Comments, p. 12559)

In the case of a child transitioning from First Steps or from other early childhood programs, the ARC should look at the child's current level of skills on the IEP, which is carried over from the IFSP. The service provider or infant-toddler program the child is coming from will have records on the child's progress on IFSP skills. If records of progress are not available, the ARC must utilize the opinions of professionals which are based on an individual assessment of student regression and recoupment. Thus the criteria for eligibility determination for ESY services for the three-year-old is the same as the criteria for all children with disabilities.

Specific skills that may be included in the IFSP or IEP for the pre-school child relate to those skills which are critical to self-sufficiency and independence, for example: basic communication, feeding, impulse control, physical mobility, toileting, or muscle control. Since ESY services are focused on maintaining the current levels of skills on the child's IEP, and not on general development, it is not necessarily required that the services be delivered in a summer preschool class. Depending on the skills, ESY services could be provided in the home, childcare center or any other arrangement that could focus on the maintenance of skills.

If the ARC believes the child will lose specific skills over the summer gap in instruction and will not regain them in a reasonable period (6 - 8 weeks) in the fall, then the ARC will consider ESY services to help maintain those specific skills over the summer. The same procedures and recording of decision/action will be followed for pre-school children that are described above for all children with disabilities.

FAPE RESOURCES

OSEP and IDEA Partnership Approved Materials:

Implementing IDEA: A Guide for Principals (NAESP/Partnerships)

Relevant KY Statutes and Regulations:

704 KAR 3:303, Program of Studies

KRS 157.280, Special Education Program furnished by district other than that of child's residence, or privately---Sharing costs---Transportation---Transportation to and from state schools for the deaf and blind.

Materials Developed by KDE:

Medicaid Procedures Manual

Pertinent Case Law (in order by date of decision):

The United States Supreme Court has indicated that “if personalized instruction is being provided with sufficient support services to permit the child to benefit educationally from the instruction”, and the instruction is under public supervision and those services are provided at public expense, meet state education standards, and are consistent with the student’s IEP, then “the child is receiving a free appropriate public education,” Hendrick Hudson Central School District Bd. Of Ed. V. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 3049 (1982).

In Cordrey v. Euckert, 917 F.2d. 1460 (6th Cir., 1990), the Sixth Circuit affirmed the importance of considering the documentation of excessive regression and prolonged recoupment in order to qualify for ESY, and gave its approval to this standard: “An appropriate education is not synonymous with the best possible education. It is also not an education which enables a child to achieve his full potential....Plaintiff’s parents are seeking an ideal education for their child. Their aspirations are understandable, even admirable. But neither they nor any other parents have the right under the law to write a prescription for an ideal education for their child and to have the prescription filled at public expense.” Further, this opinion reads: "This circuit has recently joined the Fifth Circuit in holding that the party challenging the terms of an IEP should bear the burden of proving that the educational placement established by the IEP is not appropriate."

In the seminal case of Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1997), the court heard testimony from "a distinguished expert in the field" that children with disabilities requiring "in excess of two months to regain skills lost over the summer" should be provided ESY.

Chapter II

Free Appropriate Public Education

Cyprus-Fairbanks ISD v. Michael F., 118 F.3d 245, 26 IDELR 303 (5th Cir. 1997). The case of Michael F. is fast becoming a valid analytical structure for determining whether a student has received a FAPE. The test asks the four following questions:

1. Was the program individualized on the basis of the student's assessment and performance?
2. Was the program administered in the least restrictive environment?
3. Were the services provided in a coordinated and collaborative manner by "key stakeholders?"
4. Were positive academic and nonacademic benefits demonstrated?

Note: In this case the district prevailed in part because the school was not excessive in imposing disciplinary removals, which would have constituted evidence of lack of behavioral progress.

In Houston Independent School District v. Bobby R., 31 IDELR, 185.200 F.3d 341 (5th Cir. 2000), reiterated the meaningful benefit standard, and further instructed that the child's development should be measured not in relation to the rest of the regular education class, but rather with respect to the individual student. The court viewed declining percentile scores only as evidence that the child was not progressing as fast as the nondisabled population; "the argument that he should not experience declining percentile scores may be an unrealistic goal, and it is not a goal that is mandated by IDEA. It is not necessary for the student to improve in every area to obtain educational benefit from his IEP."

"To prevail under IDEA, the party challenging the implementation of an IEP must show more than *de minimus* failure to implement all elements of that IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit."